83 - 1387

No.

IN THE

Supreme Court of the United States

October Term, 1983

LEONA M. HOLT,
Plaintiff-Appellant,

v.

COUNTY OF TIOGA, NEW YORK,
Defendant-Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

JURISDICTIONAL STATEMENT—STATE CIVIL CASE

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Question Presented.

Does the requirement of Tioga County's prior written notice ordinance constitute a violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution?

Parties to the Proceedings Below.

The parties to the proceeding in the Supreme Court of the State of New York, the Appellate Division, Third Department, and the New York Court of Appeals were Leona M. Holt, plaintiff-appellant herein, and the County of Tioga, New York, the defendant-appellee herein.

Table of Contents.

Index to Appendix.

TABLE OF AUTHORITIES.

CASES:

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COUNTY OF TIOGA, NEW YORK,

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JURISDICTIONAL STATEMENT—STATE CIVIL CASE.

Opinions Below.

The decision of the Court of Appeals entered September 27, 1983, and reported at 60 N.Y.2d 701, motion for leave to appeal denied November 29, 1983; the decision of the New York Supreme Court, Appellate Division, Third Department, reported at 95 A.D.2d 934; and the decision of the New York Supreme Court, Tompkins County Special Term, are set out in the appendix hereto. Earlier related decisions below are set out in the appendix hereto and are reported as *Holt v. County of Tioga*, 56 N.Y.2d 414, and *Holt v. County of Tioga*, 82 A.D.2d 991.

Jurisdiction.

This is an action to recover for severe personal injury sustained by Leona Holt as a result of the failure of Tioga County to maintain a highway upon which she was traveling. It draws in question the validity of Tioga County's Local Law No. 2, enacted on July 10, 1978, on the grounds that the law is repugnant to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

The majority of the New York Court of Appeals characterized Local Law No. 2 as a procedural requirement necessary to commence an action (56 N.Y. 2d 414).

The law requires a person injured by the County's failure to maintain its highways, or an uninvolved bystander, to have given written notice of the dangerous condition of the highway to the County Clerk or County Superintendent of Highways before the accident giving rise to the injury ever happened.

The law requires that a person present his claim before he has one. Under it no person can recover from a county who has such an ordinance unless prior to his injury he writes to the appropriate county official and describes that he expects to be hurt, or unless by fortuity he can find someone who wrote the County Clerk or Superintendent of Highways a "reasonable time" before he got injured and notified them of the precise defect. The law imposes a procedural impossiblity upon a litigant.

New York law provides that the State and its subdivisions will have their liability for damages determined in accordance with the same rules of law as are applied to actions against individuals or corporations. *Bernardine v.*

City of New York, 294 N.Y. 361 (1945). The right to bring an action for damages caused by defective county highways was codified by Highway Law §139 (McKinney's Vol. 24, Added L. 1950, C.640). Local Law No. 2 imposes a procedural requirement which acts to divest the plaintiff of her cause of action before that cause of action accrues. The law arbitrarily divides tort-feasors into two classes (private and governmental), thus resulting in a similar classification of the victims of such tort-feasors.

The federal constitutional question was timely raised by appellant at all stages of this litigaton. The New York Court of Appeals, answering a question certified by the Appellate Division, ruled by a four to three vote that the Local Law was constitutional under state standards. 56 N.Y. 2d 414 (1982). On remittal, Special Term found that prior written notice of the dangerous condition of the road had not been furnished, dismissed plaintiff's federal constitutional arguments, and granted summary judgment to the defendant. On June 16, 1983, the Appellate Division, Third Department, affirmed the order of Special Term. In so doing, it rejected the plaintiff's arguments set forth under the due process and equal protection clauses of the Fourteenth Amendment (95 A.D. 2d 935). Plaintiff appealed to the New York Court of Appeals. On September 27, 1983, that court granted defendant's motion to dismiss her appeal on the ground that "no substantial constitutional question is directly involved."

A timely motion for leave to appeal to the Court of Appeals on non-constitutional grounds was made on October 21, 1983. Said motion was denied by the Court of Appeals on November 29, 1983. Notice of appeal to this court was timely filed on January 18, 1984.

The jurisdiction of the United States Supreme Court to review the decisions of the Appellate Division, Third Department, and the New York Court of Appeals on appeal is conferred by 28 U.S.C. Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Schroeder v. City of New York,* 371 U.S. 208, 83 S.Ct. 279, 9 L. Ed. 2d 255 (1962); *Winters v. New York,* 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840 (1948).

Constitutional and Statutory Provisions.

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 139 of the New York Highway Law as it read on the date of the occurrence (November 19, 1978) provides as follows:

> County liable for injuries caused by defective highways and bridges
>
> "When, by law, a county has charge of the repair or maintenance of a road, highway, bridge or culvert, the county shall be liable for injuries to person or property sustained in consequence of such road, highway, bridge or culvert being defective, out of repair, unsafe, dangerous or obstructed

> existing because of the negligence of the county, its officers, agents or servants. A civil action may be maintained against the county to recover damages for any such injury; but the county shall not not be liable in such action unless a notice of claim shall have been made and served in compliance with section fifty-e of the general municipal law, and unless the action is commenced within one year from the date of service of the notice, but no such action shall be commenced upon such claim until the expiration of three months after the service of such notice.[1]

Local Law No. 2, enacted by the Tioga County Legislature on July 10, 1978, is set out in full in the appendix hereto. In relevant part, it provides:

> "(a) No civil action shall be maintained against the County of Tioga or County Superintendent of Highways for damages or injuries to persons or property sustained by reason of any highway, bridge or culvert being defective, out of repair, unsafe, dangerous or obstructed unless written notice of such defective, unsafe, dangerous or obstructed condition of such highway, bridge or culvert was actually given to the County Clerk or County Superintendent of Highways, and that there was a failure or neglect within a reasonable time after the giving of such notice to repair or remove the defect, danger or obstruction complained of, or the place made reasonably safe."

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[1]The plaintiff did comply with the 90-day post-accident notification requirement demanded by §50-e of the General Municipal Law (McKinney's Vol. 23). She also commenced her action within one year of the service of that notice.

Statement of the Case.

On November 19, 1978, appellant Leona Holt was severely injured when her vehicle went out of control and hit a tree as the result of the County of Tioga's failure to maintain a considerable portion of the shoulders of its highway known as West Creek Road. Evidence in the Record demonstrates that the dangerous condition of the road had existed for up to a year's time. Thirteen days before the accident on November 6, 1978, the County had received notice that a dangerous hole existed on the shoulder of West Creek Road one quarter mile from the accident scene. The Tioga County Highway Department's supervisor and his foreman inspected the condition described in the November 6, 1978 notice on November 13, 1978. In order to do so, they had to drive past what was to be appellant's accident scene twice in the daylight hours. Had they looked, they would have seen a dangerous shoulder drop-off existing all along that portion of the road. One day after appellant's accident, the County repaired defective shoulders on a five-mile stretch of West Creek Road surrounding the accident scene.

While the appellant was still hospitalized, her counsel served a notice of claim on the County within 90 days of the accident pursuant to New York's General Municipal Law, Section 50-e. In October of 1979, appellant commenced her action by service of a summons and complaint.

Appellee served an answer setting forth the affirmative defense of lack of compliance with Local Law No. 2.

The County moved to dismiss the action on the eve of trial based upon the lack of prior written notice. The Trial Court denied the motion.

The County appealed to the Appellate Division. Appellant briefed the question of the constitutionality of Local Law No. 2 under State standards and under the Fourteenth Amendment to the United States Constitution. The Appellate Division found the Local Law unconstitutional on State grounds (82 AD2d 991) and granted the defendant leave to appeal to the Court of Appeals on the certified question of whether or not Local Law No. 2 was unconstitutional because its provisions were inconsistent with Section 139 of the Highway Law (56 NY2d 414 at 418).

The Court of Appeals ruled four to three that the Local Law was constitutional on State grounds. In the Court of Appeals, the appellant herein also briefed the Federal Fourteenth Amendment issue. The Court of Appeals did not address the Federal issue.

The majority in the Court of Appeals conceded that "prior notification provisions such as Local Law No. 2 are most often designed to bar claims which would otherwise be authorized . . ." (56 NY2d at 419). That Court referred to the Local Law as speaking "to the presentation of claims" and referred to it as "procedure necessary to commence an action." The majority found Local Law No. 2 to be a procedural rather than a substantive rule.

Thereafter, the County moved for summary judgment on the ground that no prior written notice of the dangerous highway had been given as demanded by Local Law No. 2. On October 7, 1982, Special Term granted the County's motion. In so doing, it addressed appellant's Fourteenth Amendment claims, holding that neither the Appellate Division nor the Court of Appeals determined these issues. Special Term found Local Law No. 2 not unconstitutional under the Fourteenth Amendment citing

stare decisis as its only rational. In so doing, it observed that:

> ". . . Local laws of the character involved here are in reality attempts to bar tort actions under the guise of a procedural requirement, and that they put upon many deserving litigants an impossible burden."

On appeal to the Appellate Division, Third Department, that court also noted that neither it nor the Court of Appeals had addressed appellant's Fourteenth Amendment claims. It found the Local law constitutional under Federal law.

The Court also rejected appellant's equal protection claim.

Appellant appealed to the Court of Appeals as of right under New York Civil Practice Law and Rules, Section 5601(b)(1). On September 27, 1983, the Court of Appeals granted Tioga County's motion to dismiss her appeal "upon the ground that no substantial consitutional question is directly involved."

Appellant then moved for leave to appeal to the Court of Appeals on non-constitutional grounds. That motion was denied on November 29, 1983.

The Federal Question is Substantial.

Outside of New York State, there are no cities, towns or states which have prior written notice of defect laws.[2]

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[2]John E. Durst, Jr., *Prior Written Notice for Municipal Liability*, Trial Lawyer's Quarterly, Vol. 13/2, p. 52 (1980).

In 1902, the State of Washington's Supreme Court directly invalidated a prior notice statute as an unreasonable denial of justice. *Born v. City of Spokane*, 27 Wash. 719, 723, 68 P. 386, 390 (1902).

The Oklahoma Supreme Court struck down a prior notice statute in 1920 holding that it "so far departs from reasonableness as to amount to a denial of justice, and is therefore void." *City of Tulsa v. Wells*, 79 Okla. 39, 49, 191 P. 186 196 (1920).

In 1932, the Texas Supreme Court invalidated a prior notice requirement on the ground, *inter alia*, that it was unreasonable, and therefore a violation of the due process clause of the Constitution. *Hanks v. City of Port Arthur*, 121 Tex. 202, 206, 48 S.W. 2d 944, 948 (1932).

Local Law No. 2 is *procedural* in nature. The majority of the Court of Appeals so found at 56 N.Y.2d 414, 419, 420.

At 56 N.Y.2d 419, the majority spoke of the ordinance in reference to ". . . the procedure necessary to commence an action . . ." At 56 N.Y.2d 420, the majority referred to §139 of the Highway Law as merely imposing liability whereas such ordinances ". . . speak to the *presentation* of claims." (Emphasis added.)

One of the questions for review on this appeal is this:

> Can a procedural requirement imposed by a county take away a citizen's property right *before* that citizen has been injured?

The Appellate Division held that plaintiff's "right to sue could not have vested until the occurrence of the accident . . ."

By the time her right vested, she had already been divested of that right for "failure" to take a pre-vesting procedural step required by the county.

Appellant had a common-law right and a statutory right of action. By legislation requiring an additional procedural step, the County deprives her of that right.

In dealing with the due process of law question, the nature of the guarantee must be considered. The constitutional guarantee that "no person shall . . . be deprived of property without due process of law is, in its most fundamental sense, a limitation upon arbitrary power and a guarantee against arbitrary legislation, demanding that the law shall not be unreasonable, arbitrary or capricious and that the means selected shall have a real and substantial relation to the object sought to be attained" (2 Cooley, *Constitutional Limitations*, 8th Ed., p. 733).

In 1977, the Supreme Court of Appeals of West Virginia in *O'Neil v. City of Parkersburg*, 237 S.E.2d 504, invalidated a notice of claim provision requiring the injured party to deliver a written verified statement of the claim to the municipality within 30 days after the injury. The Cou t ruled that such provisions constitute "an invidious discrimination which is impermissible under the constitutional guarantees of equal protection." *O'Neil v. City of Parkersburg* (*supra*, 237 S.E.2d 504).

The *O'Neil* Court also held that such statutes violate the due process clauses of the Fourteenth Amendment of the United States Constitution (237 S.E.2d 504).

A procedural requirement such as Local Law No. 2, which requires the potential victim, or some other

stranger, to notify the tort-feasor, in writing, *before* the injury occurs, mandates a requirement of clairvoyance.

Special Term observed that "an exceedingly strong presumption of constitutionality attaches even to a local law. *Lighthouse Shores, Inc. v. Town of Islip*, 41 N.Y.2d 7." Justice Brennan has observed that ". . . an unfair and irrational exercise of state power cannot be transformed into a rational exercise merely by invoking a legal maxim of presumption." *Texaco, Inc. v. Short*, 454 U.S. 516, 544 (1982) (dissent).

In 1970, the Supreme Court of Michigan in *Grubaugh v. City of St. Johns*, 180 N.W.2d 778, held that, as to an incapacitated plaintiff, a 60-day post-accident notice of claim provision violated the due process and equal protection clauses of the Federal Constitution.

In so doing, the *Grubaugh* Court discussed the policy reasons behind such statutes.

It observed at 180 N.W.2d 784 that:

> "Even if we assume the above original policy considerations were once valid, today they have lost their validity and ceased to exist due to changed circumstances. In recent years, most governmental units and agencies have purchased liability insurance as authorized by statute. (citation omitted) In addition to insurance investigators, they have police departments and full-time attorneys at their disposal to promptly investigate the causes and effects of accidents occurring on streets and highways. As a result, these units and agencies are better prepared to investigate and defend negligence suits than are most private tort-feasors to

> whom no special notice privileges have been granted by the legislature."

The Court went on to "condemn the purely capricious and arbitrary exercise of legislative power whereby a wrongful and highly injurious invasion of rights is sanctioned and the litigant who fails to submit the required notice of claim is stripped of all real remedy.", 180 N.W.2d 784.

The Appellate Division ruled that "the statute possesses a rational basis in that it enables the County to protect the traveling public."

We respectfully submit that the statute enables the County to protect the County and nothing more.

The Court in *O'Neil v. City of Parkersburg*, 237 S.E.2d 504, 508 (*supra*), observed that:

> "We believe that such Legislative Act cannot be justified. It may constitute a rational basis for the city but it certainly is not rational nor in any way in the interest of an injured claimant. While the natural and inherent right of a citizen of our state to prosecute a claim for a wrongfully inflicted injury may, in some circumstances be made conditional, such circumstance and condition must be reasonable and fair to all concerned. Requiring one so injured to give notice of such injury within a short period of thirty days, as a condition precedent to the right to sue, is neither reasonable nor fair. Few laymen, unversed in the law, know within 30 days of their injury whether they will sue; fewer yet know of the thirty day notice provision (citations omitted). Within our present scheme of

> government, claim statutes serve no real beneficial use but they are indeed a trap for the unwary . . . The stated reasons for requiring notice to a city, other than the protection of public coffers, apply equally to many private tort-feasors; and protection of the public coffers never justifies the violation of a constitutional right. Neither is there a rational basis for the requirement of the notice of claim where the injured party is concerned—and it is his constitutional rights which are of paramount concern."

The ordinance here does not operate upon the rights of the citizen *after* he has suffered an injury on the highway which would trigger him to be alert to the changing requirements of the law bearing on his claim. Prior written notice provisions operate on citizens before they are injured; before they have any reason to anticipate an occasion where they will have to protect their rights.

Having suffered the triggering event of an injury, a plaintiff can at least hire an attorney to assist him with procedural steps such as filing a post-accident notice of claim. Without such a triggering event, the citizen cannot know that his rights are being extinguished by virtue of his living a normal life. By doing nothing but exist, he loses his rights. This Court has held that "In passing on the constitutionality of a State law, its effect must be judged in the light of its practical application to the affairs of men as they are ordinarily conducted." *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925).

The Court of Appeals recognized that "prior notification provisions such as Local Law No. 2 are most often designed to bar claims which would otherwise be authorized . . ." *Holt v. County of Tioga*, 56 N.Y.2d 414, 419-420 (1982).

The "rational basis" underlying the ordinance does not exist.

Under New York law, "It has long been established that a governmental body, be it the State, a county or a municipality, is under a nondelegable duty to maintain its road and highways in a reasonably safe condition, and that liability will flow for injuries resulting from a breach of the duty . . . . The source of this duty is not only the common law, but also statute." *Lopes v. Rostad*, 45 N.Y.2d 617, 623 (1978).

Both under the common law and by statute, Leona Holt has a vested right in her cause of action. One injured as a result of the negligence of another has a right of action against that other to recover damages sustained by reason of such injury. That right of action is property. *Martinez v. Fox Valley Bus Lines*, 17 F.Supp. 576, 577 (D.C.N.D. Ill., 1936); *Kent's Commentaries* (Comstock Ed. 2, p. 473).

It is axiomatic that an accrued right of action is a vested property right which may not be arbitrarily impinged. 16 Am. Jur. 2d, Constitutional Law, §421 *et seq.*

Section 139 of the New York Highway Law codifies the common law and imposes a liability. It thus creates a cause of action, a right. It gives rise to a vested right which cannot be deprived arbitrarily without injustice. By the weight of authority, a statutory right of action for damage to person or property is a vested right, and is to be protected from arbitrary governmental action. 1 Lewis' *Sutherland Statutory Construction* (2d Ed.) §284.

In this case, the plaintiff has a vested right in her cause of action which arose under common law and under New

York's codification of the common law. Section 139 of the Highway Law imposes liability. It is more than merely a consent to be sued.

Local Law No. 2, requiring as it does a *written* notice of defect, has the effect of a Statute of Limitations which starts to run a "reasonable" time *before* the accident occurs. When the injury is sustained, the Statute of Limitations has expired.

Strangers traveling through Tioga County could not comply with the law. Children, illiterates, blind persons and those whose native tongue is not English could not comply with the law. Citizens unversed in recognizing oftentimes subtle highway dangers arising through faulty maintenance could not comply with the law.

In *Barry v. Village of Port Jervis*, 64 App. Div. 268 (2d Dept. 1901), the Court struck down as violative of the Fourteenth Amendment an ordinance requiring that a notice of claim be served by the victim within forty eight hours of the accident. In so doing, it observed:

> "Is there any consideration of public policy which can justify such an attempt to extinguish rights arbitrarily? We think not." (*Ibid.*, p. 285.)

The same reasoning applies here.

County tort-feasors are treated diversely from private tort-feasors and from other County tort-feasors. One can recover if he is injured on a State road, but not if injured on a County road if the County passed the ordinance.

Prior written notice ordinances arbitrarily divide defendants into two classes, thus resulting in a similar

classification of the victims of such defendants. In one County, a victim will be left destitute and unable to provide for his or her family if severely injured. In another County, the victim may be able to survive economically. The difference is whether or not his particular County legislature wanted to save money. This is neither justice, nor equal protection.

The Supreme Court of Appeals of West Virginia held that 30 day post-accident Notice of Claim provisions violate the equal protection clause of the Fourteenth Amendment. *O'Neil v. City of Parkersburg*, 237 S.E.2d 504 (1977).

The Court in *O'Neil* could find no valid reason for requiring such notice to a municipality while no notice need be given to a private tort-feasor (237 S.E.2d at 508).

The appellant seeks review of the decisions below which upheld an arbitrary and unreasonable procedural law and deprived her of any chance to recover for the grevious injury she sustained. This case affects fundamental and cherished constitutional rights under the Fourteenth Amendment.

CONCLUSION.

This appeal should be accorded plenary review.

Respectfully submitted,

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APPENDIX A—Opinions Below.

Opinion of the Court of Appeals, Dated November 29, 1983.

COURT OF APPEALS,

STATE OF NEW YORK.

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-ninth day of November A. D. 1983.

Present, Hon. Lawrence H. Cooke, Chief Judge, presiding.

3 Mo. No. 1142

LEONA M. HOLT,

Appellant,

vs.

COUNTY OF TIOGA,

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

DONALD M. SHERAW
Clerk of the Court

Opinion of the Court of Appeals, Dated September 27, 1983.

COURT OF APPEALS,

STATE OF NEW YORK.

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-seventh day of September A. D. 1983.

Present, Hon. Lawrence H. Cooke, Chief Judge, presiding.

3 Mo. No. 880

LEONA M. HOLT,

Appellant,

vs.

COUNTY OF TIOGA,

Respondent.

A motion having heretofore been made herein upon the part of the respondent to dismiss the appeal taken by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, with costs and twenty dollars costs of motion, upon the ground that no substantial constitutional question is directly involved.

JOSEPH W. BELLACOSA
Clerk of the Court

Opinion of the Appellate Division, Third Department, 95 A.D.2d 934, Decided June 16, 1983.

10 LEONA M. HOLT, Appellant, v COUNTY OF TIOGA, Respondent. — Appeal (1) from an order of the Supreme Court at Special Term (Bryant, J.), entered October 12, 1982 in Tioga County, which granted defendant's motion for summary judgment dismissing plaintiff's complaint, and (2) from the judgment entered thereon. Plaintiff was injured in an accident on West Creek Road in Tioga County when the right wheels of the pickup truck she was driving fell into a depression or drop-off on the edge of the pavement causing the vehicle to veer across the highway and collide with a tree. Suit was brought against the county for negligently maintaining the shoulder. The county interposed as an affirmative defense that it had not been given prior notice of the defective condition as was required by Tioga County Local Law No. 2 of 1978. Our earlier decision declaring the local law repugnant to section 139 of the Highway Law and therefore unconstitutional (82 AD2d 991) was reversed on appeal (56 NY2d 414). On remittal, Special Term found that prior notice of the shoulder condition giving rise to the accident had not been furnished, dismissed plaintiff's estoppel and constitutional arguments, and granted summary judgment in favor of defendant. Plaintiff contends that Local Law No. 2 contravenes the due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution. Initially, we note that since neither we nor the Court of Appeals expressly addressed these particular constitutional claims earlier, the doctrine of law of the case does not hinder our consideration of them now (see *Barrett v State Mut. Life Assur. Co.*, 58 AD2d 320, affd 44 NY2d 872, cert den 440 US 912). As for the merits of this argument, we find no constitutional violation. The right to sue a subdivision of the State for negligence in the performance of a governmental function is founded upon statute and the legislative authority involved may properly limit such right as it sees fit (*Matter of Brown v Board of Trustees of Town of Hamptonburg, School Dist. No. 4*, 303 NY 484, 489; *MacMullen v City of Middletown*, 187 NY 37). Since Local Law No. 2, which was in effect at the time of the accident, defined a right to sue only if prior written notice had been given to the county, the absence of such notice means that plaintiff never possessed a vested right to bring an action. Moreover, the statute possesses a rational basis in that it enables the county to protect the traveling public (*Martin v City of Cohoes*, 37 NY2d 162, 166); for these reasons we find no denial of due process. We also reject the argument that Local Law No. 2 has been applied in an impermissibly retroactive manner. This position is based upon the premise that the alleged defect in the shoulder of the road existed prior to the enactment of the statute and that the county should not be permitted to legislate away liability for such a defect by imposing a prior notice requirement. Plaintiff's focus solely on the existence of the defect is, however, misguided because her purported right to sue could not have vested until the occurrence of the accident, at which point Local Law No. 2 had been in effect for over four months. Thus, the statute has not been retroactively applied (see *Dodin v Dodin*, 17 Misc 35, 40, affd 16 App Div 42, affd 162 NY 635). The equal

protection argument is similarly unavailing. All victims involved in Tioga County accidents caused by improper highway maintenance are required to demonstrate prior notice. Furthermore, it is not illogical to allow each county to determine whether a prior written notice ordinance is desirable, for each is responsible for the maintenance of certain roadways within its geographical jurisdiction and dissimilar local road conditions exist in different parts of the State. With respect to the assertion that the notice requirement of the local law had indeed been complied with, the most sanguine showing plaintiff makes is that a resident of the West Creek Road area had, once in 1976 and again 13 days before the accident, complained to the county about the condition of the road's shoulder. Each complaint was directed at a point concededly located at least one-quarter mile away from the place where plaintiff's truck left the highway; Special Term quite correctly found this to be inadequate notice. While the local law is silent as to the specificity required of the prior notice, it should at the very least be such that it would "probably have brought the particular condition at issue" to the attention of the authorities (*Brooks v City of Binghamton*, 55 AD2d 482, 483-484). Notification of a hole in the shoulder of the road a quarter of a mile from the accident scene did not create an awareness of the defect which is at the center of this controversy. Moreover, the fact that county personnel, in the course of responding to these complaints, may have driven by the site which allegedly precipitated the accident does not render the county liable. Except where unusual circumstances are shown to prevail (see *Blake v City of Albany*, 63 AD2d 1075, affd 48 NY2d 875, where the area in question was inspected on an almost daily basis by the city to ensure against the very danger which caused the accident), it is the prior written notice and not possible actual or constructive knowledge on the municipality's part which affords the plaintiff the right to recover under these statutes (*MacMullen v City of Middletown*, 187 NY 37, 47, *supra*); thus, the notice provision must be strictly respected. Finally, we reject the contention that the county should be estopped from taking refuge in the local law because it failed to observe the statute's record-keeping provisions which require that "the County Clerk and the County Superintendent of Highways shall keep an indexed record, in a separate book, of all notices which they shall receive". Apparently only the superintendent of highways kept such a record. Not only is the language of the statute unclear concerning the responsibility of each to keep a separate record, but defendant did in fact receive the information respecting prior notifications from the superintendent of highways; more importantly, nothing in the record indicates plaintiff relied to her detriment upon the county's failure to maintain a duplicate set of these records (see *Andersen v Long Is. R. R.*, 88 AD2d 328, 342). Order and judgment affirmed, without costs. Main, J. P., Mikoll, Yesawich, Jr., Weiss and Levine, JJ., concur.

Decision of Bryant, J., Dated October 7, 1982.

STATE OF NEW YORK, SUPREME COURT,

COUNTY OF TIOGA.

LEONA M. HOLT,

Plaintiff,

against

COUNTY OF TIOGA,

Defendant.

Index No. 11990

Tompkins County Special Term
August 12, 1982

Thaler & Thaler, Esqs., Richard B. Thaler, Esq. and Peter J. Walsh, Esq. of counsel, attorneys for defendant, for defendant's motion for summary judgment and in opposition to plaintiff's motion for summary judgment to strike defendant's second affirmative defense.

Coughlin & Gerhart, Esq., Peter H. Bouman, Esq. of counsel, attorneys for plaintiff, in opposition to defendant's motion for summary judgment and for plaintiff's motion for summary judgment dismissing the defendant's second affirmative defense.

FREDERICK B. BRYANT, J.:

Decision.

The defendant has moved pursuant to *CPLR* §3212 for summary judgment dismissing plaintiff's complaint on the ground that the defendant, County of Tioga, had no prior written notice of the alleged defective condition of the highway as required by Tioga County Local Law No. 2 of 1978.

The plaintiff by cross-motion has moved for an order granting summary judgment in her favor dismissing the defendant's second affirmative defense on the ground said affirmative defense has no merit.

This action arises out of a single vehicle accident which occurred on November 19, 1978 on Tioga County Road 33, known as West Creek Road. Shortly after midnight on November 19, 1978, plaintiff was operating her 1973 Ford pick-up truck in a generally northerly direction on said road. She alleges that the right wheels dropped into a depression or drop-off on the edge of the pavement which caused her to lose control of the truck resulting in her receiving serious personal injuries, and that her injuries were caused by the defendant's negligence in failing to properly maintain and repair its said highway.

The plaintiff further alleged in paragraph 6 of her complaint that:

> "The defendant, its officers and employees had written notice and actual knowledge of the dangerous condition since at least September 26, 1975, and despite said knowledge, failed and refused to repair said defects."

By answer, defendant denied material allegations in the complaint, and asserted, as its second affirmative defense, that plaintiff failed to comply with Tioga County Local

Law No. 2 of 1978 which became effective on July 10, 1978 and which provides as follows:

> "Section 1(a) No civil action shall be maintained against the County of Tioga or county superintendent of highways for damages or injuries to persons or property sustained by reason of any highway, bridge or culvert being defective, out of repair, unsafe, dangerous or obstructed unless written notice of such defective, unsafe, dangerous or obstructed condition of such highway, bridge or culvert was actually given to the county clerk or county superintendent of highways, and that there was a failure or neglect within a reasonable time after the giving of such notice to repair or remove the defect, danger or obstruction complained of, and the place made reasonably safe.
>
> (b) The county clerk and the county superintendent of highways shall keep an indexed record, in a separate book, of all notice which they shall receive of the existence of such defective, unsafe, dangerous or obstructive condition which record shall set forth the date of receipt of such notice, the nature and location of the condition stated to exist and the name and address of the person from whom the notice is received.

The defendant previously moved for a judgment pursuant to *CPLR* §3211(a) dismissing plaintiff's action on the ground that the complaint failed to state a cause of action. On December 3, 1980, Supreme Court, Special Term, Honorable John M. Keane, J. denied defendant's motion to dismiss.

On an appeal, the Appellate Division modified the order of Special Term, on the law, by adding thereto a

paragraph striking the second affirmative defense, and, as so modified, affirmed, on the ground that Tioga County "Local Law, No. 2 is incompatible and unharmonious with the general law, inconsistent with it . . ., and, therefore, unconstitutional insofar as it requires prior written notice".

Defendant appealed to the Court of Appeals, by permission of the Appellate Division on the following certified question:

> "Is the determination of the Appellate Division that Local Law No. 2 of 1978 of the County of Tioga is Unconstitutional correct?"

The Court of Appeals answered the certified question in the negative and reversed the order of the Appellate Division and reinstated defendant's second affirmative defense.

The defendant has now moved for an order pursuant to *CPLR* §3212 granting defendant summary judgment dismissing plaintiff's complaint on the ground that defendant had no prior written notice of the alleged defective condition of the highway as required by Tioga County Local Law No. 2 of 1978.

Plaintiff has made a cross-motion for an order granting summary judgment in plaintiff's favor dismissing defendant's second affirmative defense. Plaintiff claims that (1) the defendant is estopped from asserting Local Law No. 2 as a defense by its own noncompliance, (2) the notice received by defendant was sufficient as a matter of law, (3) Tioga County received prior written notice in accordance with proceedings set up by the Tioga County Superintendent of Highways for handling complaints of that nature, (4) based upon the facts, Local Law No. 2 is impermissible retrospective legislation, and (5) Local Law No. 2 violates

the Fourteenth Amendment of the United States Constitution that provides "no person shall be denied his property without due process of law".

The defendant's motion must be granted and the plaintiff's motion must be denied.

Fourteenth Amendment Claim

Defendant claims that the doctrine of the law of the case precludes plaintiff from asserting her constitutional claims on this motion on the ground plaintiff previously asserted this claim on the original motion to dismiss. It is true that when a court makes a determination of a legal issue in a case, that determination becomes the law of the case and controls when the issue is again presented in the same case. 1 *Carmody-Wait 2d* Section 2:64. However, this claim of defendant has no merit for the simple reason that neither the Appellate Division or the Court of Appeals made any determination of the issue of unconstitutionality under the United States constitution. The Appellate Division determined that Local Law No. 2 of 1978 "does not pass constitutional muster" under the *New York Constitution,* Art. IX, §2, subd. (c) and §139 of the *Highway Law.*

The Court of Appeals did not reach and determine this issue when it answered in the negative the limited question certified by the Appellate Division. Implied determinations of law are not favored in applying the doctrine of the law of the case. *Barrett v. State Mutual Life Assurance Company,* 58 A D 2d 320, affd. 44 N Y 872, cert. den. 440 U.S. 912.

This Court finds on this issue that Tioga County Local Law, No. 2 of 1978 is constitutional and is not rendered unconstitutional by the Fourteenth Amendment to the United States Constitution. An exceedingly strong presumption of constitutionality attaches even to a local

law. *Lighthouse Shores, Inc. v. Town of Islip,* 41 N Y 2d 7. New York courts have consistently upheld the validity of statutes requiring prior written notice of the alleged dangerous condition of streets and highways. See, e.g., *MacMullen v. City of Middletown,* 187 N.Y. 37; *Fullerton v. City of Schenectady,* 285 App. Div. 545 (Third Dept.), affd. 309 N.Y. 701, App. Dismissed, 350 U.S. 980; 980; *Canzano v. Town of Gates,* 85 A D 2d 878; *Klimek v. Town of Ghent,* 71 A D 2d 359; *Ellis v. City of Geneva,* 259 A.D. 502, affd. 288 N.Y. 478.

The Appellate Division in its decision *Fullerton v. City of Schenectady, supra,* at page 548 said:

> ". . . local laws of the character involved here are in reality attempts to bar tort actions under the guise of a procedural requirement, and that they put upon many deserving litigants an impossible burden. However, it is too late in the day to urge this consideration as decisive. This matter was debated and determined long ago. (*MacMullen v. City of Middletown,* 187 N.Y. 37."

It's far too late for this Court sitting as court of first instance to deviate from well established decisions of our appellate courts.

Estoppel

The Court finds no merit in plaintiff's claim of estoppel. The Court of Appeals first articulated the doctrine of equitable estoppel as applied to notice of claim and related requirements in actions against the government and its subdivisions in *Bender v. New York City Health and Hospitals Corp.,* 38 N Y 2d 662.

In *Anderson v. Long Island Railroad,* 88 A D 2d 328, at page 342 the court summarized the basis of an estoppel in these situations as follows:

" 'We believe that where a governmental subdivision acts or comports itself wrongfully or negligently, inducing reliance by a party who is entitled to rely and who changes his position to his detriment or prejudice, that subdivision should be estopped from asserting a right or defense which it otherwise could have raised. (See, generally, Applicability of doctrine of estoppel against government and its governmental agencies, Ann., 1 ALR2d 338; 2 Antieau, Municipal Corporations, §16A.22; cf. *LaPorto v. Village of Philmont,* 39 NY2d 7.) The equitable bar to a defense may arise by virtue of positive acts, or omissions where there was a duty to act. By applying the doctrine of equitable estoppel to notice of claim situations, the courts may insure that statutes like section 50-e of the General Municipal Law, do not become 'a trap to catch the unwary or the ignorant' (see *Sweeney v. City of New York,* 225 NY 271, 273)." (38 NY2d, at p 668.)

The motion papers demonstrate that plaintiff has not changed her position to her detriment or prejudice induced by wrongful acts of the defendant.

Retroactivity

Plaintiff's claim that Town Law No. 2 of 1978 is invalid as retroactive legislation has no merit.

This local law became effective July 10, 1978. Plaintiff's accident which is the basis of this action occurred on November 19, 1978. Plaintiff had no claim until November 19, 1978 at which time the local law had been in force for over four months. The application of this local law to plaintiff's claim does not deprive her of any rights vested on or before July 10, 1978.

Written Notice of Defective Highway

Plaintiff alleges in her complaint that written notice was given to defendant of the alleged dangerous condition of the road and despite said knowledge, defendant failed to repair said defects. Plaintiff claims the notice given to defendant was sufficient as a matter of law and was given in accordance with procedures established by the Tioga County Superintendent of Highways for handling complaints about highway defects.

Defendant submitted affidavits of its Superintendent of Highways and the Tioga County Clerk stating that they received no written notices of any defect or dangerous condition in the shoulder of West Creek Road in the vicinity where plaintiff's accident occurred. Extensive discovery proceedings failed to reveal any written notice of a dangerous condition where the accident happened.

Plaintiff points to three alleged written notices of dangerous conditions from:

(1) Mrs. Dorothy Torrey;

(2) Petition of residents of West Creek Road area for a study of West Creek Road for the purposes of "an enforced speed limit"; and

(3) Accident report of Deanna Ringwald.

On or about June 30, 1976 Dorothy Torrey wrote the Tioga County Highway Superintendent requesting repairs on the "low (very low) spots on the side of the road in front of our house, by driveway and mailbox in Weltonville". Plaintiff concedes that the Torrey house referred to in her letter was one quarter of a mile from the scene of plaintiff's accident. The Tioga County Highway Superintendent's records indicate that repairs were made as requested by Mrs. Torrey in July 1976. The notice of a

defect at least one quarter of a mile from the point of plaintiff's accident does not reasonably encompass the particular defect alleged by plaintiff. See, *Brooks v. City of Binghamton*, 55 A D 2d 482.

In April 1975, numerous residents of West Creek Road area signed a petition addressed to the Tioga County Highway Department requesting a study of the West Creek Road, "reason being, for an enforced speed limit". This petition contains no statement about any defective, unsafe or dangerous highway condition which might have caused plaintiff's accident. Defendant's superintendent forwarded this petition to the New York State Department of Transportation Regional Engineer without comment. The State Transportation Department conducted a Linear Speed Zone Evaluation of a portion of West Creek Road. A copy of the evaluation report was not sent to defendant or its Highway Superintendent or County Clerk.

On April 1, 1974 one Deanna Ringwald reported a one car accident occurred the previous day on West Creek Road in the Town of Owego. The report was found in the Tioga County Sheriff's records. This report makes no reference to a dangerous condition of the West Creek Road. There is no proof that this accident report was given to the Tioga County Superintendent or the County Clerk.

For the purpose of this decision the Court assumes any adequate written notice of defect served prior to the effective date of Local Law No. 2 would satisfy the statute. The Court concludes that these alleged written notices are insufficient to satisfy the requirements of the local statute. The plaintiff has failed to show that any written notice of defect was given to the Tioga County Highway Superintendent or County Clerk subsequent to the adoption of the Local Law.

The defendant has established its defense of plaintiff's failure to comply with Tioga County Local Law No. 2 of

1978 sufficiently to warrant the Court as a matter of law in directing judgment in its favor. *CPLR,* Rule 3212(b).

The defendant's motion for summary judgment in its favor is granted and plaintiff's cross-motion is denied.

Submit order.

FREDERICK B. BRYANT
J.S.C.

Finally submitted August 31, 1982.
Dated: Ithaca, New York
October 7, 1982.

APPENDIX B—Related Decisions Below.

Decision of the Court of Appeals, State of New York, Decided June 15, 1982

SUMMARY

APPEAL, by permission of the Appellate Division of the Supreme Court in the Third Judicial Department, from an order of said court, entered June 29, 1981, which modified, on the law, and, as modified, affirmed an order of the Supreme Court at Special Term (JOHN M. KEANE, J.), entered in Tioga County, denying defendant's motion to dismiss the complaint. The modification consisted of striking the second affirmative defense in the answer. The following question was certified by the Appellate Division: "Is the determination of the Appellate Division that Local Law No. 2 of 1978 of the County of Tioga is Unconstitutional Correct?"

In an action against the County of Tioga to recover damages for injuries sustained in a one-vehicle accident on a county-owned highway, plaintiff alleged that the shoulder of the highway was defective, causing her to lose control of her truck and strike a tree, and that the county had failed to inspect or repair the road and was thus grossly negligent. In its answer, the county raised the affirmative defense that the plaintiff did not plead or prove compliance with Tioga County Local Law No. 2 of 1978, which makes prior written notice of a dangerous condition or defect a condition precedent to maintaining a suit against the county, and moved to dismiss the complaint. Plaintiff moved for a day certain and asserted that she had complied with Local Law No. 2 and that the local law was unconstitutional. Special Term granted plaintiff's motion to the extent of setting a trial date and denied defendant's motion to dismiss. On appeal from that order, the Appellate Division ordered the affirmative defense struck on the ground that Local Law No. 2 was unconstitutional because it was inconsistent with section 139 of the Highway Law.

The Court of Appeals reversed, holding, in an opinion by Judge JASEN, that Local Law No. 2 is constitutional, inasmuch as a local law which makes prior written notification

of a dangerous condition or defect a condition precedent to maintaining a suit against the county is not inconsistent with the general State law which imposes liability on the county for injuries caused by unsafe or improperly maintained highways.

Holt v County of Tioga, 82 AD2d 991, reversed.

HEADNOTE

Counties — Prior Written Notice of Highway Defects

Tioga County Local Law No. 2 of 1978, which makes prior written notification of a dangerous condition or defect a condition precedent to maintaining a suit against the county, does not conflict with the general State law (Highway Law, § 139) which imposes liability on the county for injuries caused by unsafe or improperly maintained highways so as to be declared unconstitutional. Regarding the procedure necessary to commence an action pursuant to section 139 of the Highway Law, that statute defers to section 50-e of the General Municipal Law, subdivision 4 of which specifically allows for the enactment of prior notification statutes and requires compliance with such laws, making no distinction between general and local laws; similarly, section 139 of the Highway Law contains no provision limiting the applicability of section 50-e of the General Municipal Law or barring local laws which impose conditions precedent to maintaining an action against a county. Accordingly, the County of Tioga acted within its constitutionally mandated home rule powers in enacting Local Law No. 2 (see NY Const, art IX, § 2, subd [c], par [ii], cls [5], [6]).

POINTS OF COUNSEL

Peter J. Walsh and *Nathaniel F. Knappen* for appellant. I. Tioga County Local Law No. 2 of 1978 is authorized by the Municipal Home Rule Law and is not in express conflict with general State law. (*Fullerton v City of Schenectady*, 285 App Div 545, 309 NY 701; *Lighthouse Shores v Town of Islip*, 41 NY2d 7; *Belle v Town Bd. of Town of Onondaga*, 61 AD2d 356; *New Rochelle Trust Co. v White*, 283 NY 223; *Jewish Consumptives' Relief Soc. v Town of Woodbury*, 230 App Div 228, 256 NY 619; *People v County of Westchester*, 282 NY 224; *McMillen v Brown*, 20 AD2d 531; *Matter of Reuss v Katz*, 43 Misc 2d 921; *People v Del Gardo*, 1 Misc 2d 821.) II. The State has not evinced an intent to pre-empt the field of prior notice requirements for counties. (*Wholesale Laundry Bd. of Trade v City of New York*, 17 AD2d 327, 12 NY2d 998; *Matter of Marino v Town of Ramapo*, 68 Misc 2d 44; *Pennsylvania v Nelson*, 350 US 497; *Hines v Davidowitz*, 312 US 52; *People v Broady*, 5 NY2d 500, 361 US 8; *People v Lewis*, 295 NY 42; *People v Cook*, 34 NY2d 100.) III. A finding of unconstitutionality

would vitiate other legislative enactments. (*Marcus Assoc. v Town of Huntington*, 45 NY2d 501; *Flanagan v Mount Eden Gen. Hosp.*, 24 NY2d 427; *Childs v Childs*, 69 AD2d 406.)

Peter H. Bouman and *James P. O'Brien* for respondent. I. Defendant's prior written-notice ordinance is inconsistent with general State law and is therefore unconstitutional. (*Matter of Wilson v Board of Supervisors of County of Oneida*, 152 Misc 645; *Little v County of Suffolk*, 73 AD2d 663; *Lopes v Rostad*, 45 NY2d 617; *Thomas v Consolidated Fire Dist. No. 1 of Town of Niskayuna*, 50 NY2d 143; *MacMullen v City of Middletown*, 112 App Div 81, 187 NY 37; *Fullerton v City of Schenectady*, 285 App Div 545; *Flanagan v Mount Eden Gen. Hosp.*, 24 NY2d 427; *MacPherson v Buick Motor Co.*, 217 NY 382.) II. Local Law No. 2 denies citizens equal protection of the law. III. Local Law No. 2 deprives citizens of due process of law. (*Snyder v Massachusetts*, 291 US 97.) IV. Tioga County's Local Law is not authorized by section 50-e of the General Municipal Law. (*Doremus v Incorporated Vil. of Lynbrook*, 18 NY2d 362.)

OPINION OF THE COURT

JASEN, J.

The issue raised by this appeal is whether a local law which makes prior written notification of a dangerous condition or defect a condition precedent to maintaining a suit against the county conflicts with the general State law which imposes liability on the county for injuries caused by unsafe or improperly maintained highways so that it must be declared unconstitutional.

Plaintiff Leona Holt brought this action against the County of Tioga to recover actual and punitive damages for injuries she sustained in a one-vehicle accident on a county-owned highway. In her complaint, she alleged that the shoulder of the highway was defective because it was lower than the paved portion of the highway and that this defect caused her to lose control of her truck and strike a tree. She also alleged that the county failed to inspect or repair the road and was thus grossly negligent.

The county raised, in its answer, the affirmative defense that the plaintiff did not plead or prove compliance with Tioga County Local Law No. 2 of 1978 and moved to dismiss the complaint. Plaintiff moved for a day certain and in response to the defendant's motion to dismiss, plaintiff asserted that she had complied with Local Law No. 2, that the county should be estopped from raising the issue and that the local law was unconstitutional. Special Term granted plaintiff's motion to the extent of setting a trial date and denied, without comment, defendant's motion to dismiss.

The county brought an appeal from that order. The Appellate Division ordered the affirmative defense in question struck on the ground that Local Law No. 2 was unconstitutional. In so holding, the Appellate Division stated that although there is a strong presumption that local laws are constitutional, a local law cannot stand if it conflicts with a general law passed by the State Legislature. Because section 139 of the Highway Law, a general law, imposes liability on counties without reference to any prior notification requirements, the Appellate Division reasoned that any local law which imposes a condition precedent is inconsistent and, thus, unconstitutional. The Appellate Division granted leave to appeal to this court on a certified question so that we might consider whether the Appellate Division correctly found Local Law No. 2 to be unconstitutional. For the reasons that follow, we hold Local Law No. 2 to be constitutional.

When a locality exercises the legislative power delegated to it by the State Constitution, there is an "exceedingly strong presumption" that the local law enacted is constitutional. (*Lighthouse Shores v Town of Islip*, 41 NY2d 7, 11.) In order to defeat that presumption of validity, a party must show that the local law in question is inconsistent with either provisions of the State Constitution or with a general law enacted by the State Legislature.

Local governments, including counties, are authorized by the State Constitution to "adopt and amend local laws *** relating to *** [t]he presentation, ascertainment and discharge of claims against it [or] [t]he acquisition, care, management and use of its highways, roads, streets,

avenues and property." (NY Const, art IX, § 2, subd [c], par [ii], cls [5], [6].) This constitutional authority is implemented by identical provisions in subdivision 1 of section 10 of the Municipal Home Rule Law. Section 3 of article IX further provides that: "Rights, powers, privileges and immunities granted to local governments by this article shall be liberally construed." (NY Const, art IX, § 3, subd [c].) But section 2 of article IX also restricts the power granted local governments by providing that only laws which are "not inconsistent with the provisions of this constitution or any general law" may be enacted. A general law is defined by article IX (§ 3, subd [d], par [1]) as one "which in terms and effect applies alike to all counties, all counties other than those wholly included within a city, all cities, all towns or all villages." Thus, the specific question raised by this appeal is whether the local law in question is inconsistent with either the Constitution or any general law. Since this appeal arises on a certified question, our review is limited to whether Local Law No. 2 is unconstitutional, as the Appellate Division found, because its provisions are inconsistent with section 139 of the Highway Law.

Local Law No. 2 provides in pertinent part that: "No civil action shall be maintained against the County of Tioga * * * for damages or injuries to persons or property sustained by reason of any highway, bridge or culvert being defective, out of repair, unsafe, dangerous or obstructed unless written notice of such defective, unsafe, dangerous or obstructed condition of such highway, bridge or culvert was actually given to the County Clerk or County Superintendent of Highways, and that there was a failure or neglect within a reasonable time after the giving of such notice to repair or remove the defect, danger or obstruction complained of".

Section 139 of the Highway Law, a general law because it applies to all counties in the State, provides that when "a county has charge of the repair or maintenance of a road, highway, bridge or culvert, the county shall be liable for injuries to person or property * * * but the county shall not be liable in such action unless a notice of claim shall have been made and served in compliance with section

fifty-e of the general municipal law". The notice procedure to be used in maintaining a civil action against the county is thus controlled by section 50-e of the General Municipal Law.

That statute requires that in a tort action a notice of claim must be filed within 90 days of when the claim arose. Subdivision 4 of section 50-e further provides: "Requirements of [this] section [are] exclusive except as to conditions precedent to liability for certain defects or snow or ice. No other or further notice * * * shall be required as a condition to the commencement of an action or special proceeding * * * provided, however, that nothing herein contained shall be deemed to dispense with the requirement of notice of the defective, unsafe, dangerous or obstructed condition of any street, highway * * * where such notice now is, or hereafter may be, required by law, as a condition precedent to liability".

Reading these statutes together, we do not find Local Law No. 2 to be inconsistent with section 139 of the Highway Law. Local Law No. 2 speaks to the notification required as a condition precedent to maintaining a civil action against a county for negligent maintenance of county highways. Section 139 of the Highway Law has the sole effect of imposing liability on counties for injuries caused by unsafe or improperly maintained highways. As to the procedure necessary to commence an action, section 139 of the Highway Law defers to section 50-e of the General Municipal Law. Subdivision 4 of section 50-e of the General Municipal Law specifically allows for the enactment of prior notification statutes and requires compliance with such laws. There is no indication in the statutory language that the Legislature in any way intended to limit that provision's applicability. The statutory language makes no distinction between general laws and local laws; it must be read to apply alike to all laws enacted by any legislative body in this State. Similarly, section 139 of the Highway Law contains no provision that can be read to limit the applicability of section 50-e of the General Municipal Law or to bar local laws which impose conditions precedent to maintaining an action against a county. Thus, it cannot be said that the Legislature intended to preclude counties from enacting prior notification statutes

when, pursuant to section 139 of the Highway Law, it imposed liability on the counties.

While it is true that prior notification provisions such as Local Law No. 2 are most often designed to bar claims which would otherwise be authorized, that alone is not adequate to overcome the presumption of constitutionality. It cannot be said that statutes enacted under this grant of legislative authority are inconsistent with general laws which merely impose liability but do not speak to the presentation of claims. Rather, it appears that by not specifically addressing the question of prior notification, the Legislature deferred to the judgment of local governments.

In the past, when this court has considered the constitutionality of other prior notification statutes, which were also enacted pursuant to similar delegations of legislative authority, we have found them to be constitutional. In *Fullerton v City of Schenectady* (285 App Div 545, affd 309 NY 701, app dsmd 350 US 980), this court affirmed, without opinion, the order of the Appellate Division which dismissed plaintiff's complaint on the ground that the failure to comply with the City of Schenectady's prior notification statute meant that the action could not be pursued. In so holding, the Appellate Division found that Schenectady's prior notification law was authorized by the home rule amendment to the State Constitution, and by both the City Home Rule Law and the Second Class Cities Law The decision in *Fullerton* (*supra*) was based, in part, on this court's decision in *MacMullen v City of Middletown* (187 NY 37) in which we held a prior notification provision in a municipal charter to be a valid exercise of legislative power. We see no reason to deviate from those holdings. In this case, as in those, the Legislature has deferred to the localities to determine what notice is required. The County of Tioga, which "exercise[s], by delegation, a portion of the sovereign power" (*MacMullen v City of Middletown*, *supra*, at p 41), acted within its constitutionally mandated powers in enacting Local Law No. 2. Neither section 139 of the Highway Law nor section 50-e of the General Municipal

Law indicate any intention by the Legislature to restrict the county's constitutionally delegated powers or to bar prior notification statutes.

Accordingly, the order of the Appellate Division, insofar as appealed from, should be reversed, and the second affirmative defense should be reinstated. The question certified should be answered in the negative.

Chief Judge COOKE (dissenting). A reading of the pertinent constitutional and statutory provisions and case law reveals nothing that authorizes the County of Tioga's enactment of Local Law No. 2 of 1978. Therefore, I respectfully dissent.

The majority finds two constitutional bases for validating the local law. First, the majority relies on a local government's authority to legislate as to "[t]he presentation, ascertainment and discharge of claims against it" (NY Const, art IX, § 2, subd [c], par [ii], cl [5]). Reading this in conjunction with subdivision 4 of section 50-e of the General Municipal Law, the majority concludes that Local Law No. 2 is a proper procedural rule. Second, the majority finds the ordinance valid under the county's power to legislate as to "[t]he acquisition, care, management and use of its highways, roads, streets, avenues and property" (NY Const, art IX, § 2, subd [c], par [ii], cl [6]).

Initially, the nature of laws such as Local Law No. 2 should be determined — i.e., does the ordinance affect procedural or substantive rights. The unavoidable conclusion is that the prior-notice law here is a substantive rule. The ordinance's entire thrust is to remove from the county the threat that it may be found to have had constructive notice of a defect. As this court noted in discussing the purpose of a similar law in *MacMullen v City of Middletown* (187 NY 37, 41), "The fact of knowledge should no longer be dependent upon inferences from the evidence of circumstances; nor the liability of the municipality be left to a determination reached upon an indulgent construction of the legal rule as to actual notice."

The conclusion that the local law is substantive is buttressed by a consideration of section 50-e of the General

Municipal Law. A notice of claim under that section is "a condition precedent to the commencement of an action or special proceeding" (General Municipal Law, § 50-e, subd 1, par [a]). And such notice may be served after the action is commenced if, among other concerns, "the delay in serving the notice of claim [has not] substantially prejudiced the public corporation in maintaining its defense *on the merits*" (§ 50-e, subd 5 [emphasis added]). In contrast, a prior-notice law is characterized as "a condition precedent to liability for damages or injuries" (§ 50-e, subd 4), rather than merely a condition precedent to the commencement of an action. In keeping with its substantive nature, the failure to give such notice is not remediable by a later act.

As a substantive rule of law, then, a prior-notice ordinance does not come within the constitutional language regarding a local government's power to legislate over "[t]he presentation, ascertainment and discharge of claims against it" (NY Const, art IX, § 2, subd [c], par [ii], cl [5]). The terms of clause (5) sound in procedural, not substantive law.

In addition, when viewed in light of the over-all limitation precluding local governments from legislating inconsistently with the general law of the State (NY Const, art IX, § 2, subd [c], par [ii]), clause (5) cannot reasonably be read to authorize enacting substantive laws. First, a municipality has no immunity from lawsuit greater than that of the State unless authorized by Constitution, statute, or charter (see *Bernardine v City of New York*, 294 NY 361, 364-365). If clause (5) is to be read as providing such authority, then nothing exists to prevent any municipality from granting itself total immunity. This, of course, is contrary to the policy underlying the Court of Claims Act, which is generally to subject the State and its subdivisions to liability "determined in accordance with the same rules of law as applied to actions * * * against individuals or corporations" (Court of Claims Act, § 8; see *Bernardine v City of New York, supra*). Second, it is difficult to identify any area of law that is not already the subject of either

statute or case law, including rules about constructive notice. Consequently, as a practical matter, no municipality can limit its immunity through the amendment by local law of substantive rules of law without running afoul of the State's general law as declared in section 8 of the Court of Claims Act. Thus, clause (5) reasonably can be construed as applying only to procedural matters; a contrary interpretation would recognize a grant of power that would be virtually meaningless. And, as a limited grant of power to adopt procedural rules, clause (5) cannot be authority for a substantive law such as Local Law No. 2.

Nor can it be said that subdivision 4 of section 50-e of the General Municipal Law provides any such authority. Section 50-e as a whole is a procedural statute regulating the commencement of actions against municipalities. Subdivision 4 states that section 50-e sets forth the exclusive requirement for serving a notice of claim as a condition precedent to commencing such actions, but that actual notice of the defect is not thereby dispensed with when required by law.* The majority, focusing on a single phrase in subdivision 4 — "where such notice now is, *or hereafter may be*, required by law" (emphasis added) — asserts that this implicitly authorizes local governments to enact prior-notice laws. Accurately read, however, subdivision 4 does nothing more than resolve a potential conflict, present or future.

It should be noted that the terms of subdivision 4 are particularly detailed. Its proviso refers to "the requirement

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* Subdivision 4 of section 50-e of the General Municipal Law reads in its entirety: "Requirements of section exclusive except as to conditions precedent to liability for certain defects or snow or ice. No other or further notice, no other or further service, filing or delivery of the notice of claim, and no notice of intention to commence an action or special proceeding, shall be required as a condition to the commencement of an action or special proceeding for the enforcement of the claim; provided, however, that nothing herein contained shall be deemed to dispense with the requirement of notice of the defective, unsafe, dangerous or obstructed condition of any street, highway, bridge, culvert, sidewalk or crosswalk, or of the existence of snow or ice thereon, where such notice now is, or hereafter may be, required by law, as a condition precedent to liability for damages or injuries to person or property alleged to have been caused by such condition, and the failure or negligence to repair or remove the same after the receipt of such notice."

of notice of the defective, unsafe, dangerous or obstructed condition of any street, highway, bridge, culvert, sidewalk or crosswalk, or of the existence of snow or ice thereon". This substantially repeats the language in subdivision 1 of section 65-a of the Town Law and section 6-628 of the Village Law, both of which are State-enacted prior-notice laws pre-existing section 50-e. A long-standing standard rule of statutory construction is that the Legislature is deemed cognizant of all existing laws (see *Davis v Supreme Lodge, Knights of Honor*, 165 NY 159, 166; McKinney's Cons Laws of NY, Book 1, Statutes, p 56). When prior law is contradicted by subsequent legislation there exists the possibility that the Legislature has repealed the former by implication (see *Davis v Supreme Lodge, Knights of Honor, supra*, at pp 166-167; cf. *American Sugar Refining Co. of N. Y. v Waterfront Comm. of N. Y. Harbor*, 55 NY2d 11, 30). Rather than broadly reading subdivision 4 of section 50-e to be an implicit grant of power, it should be recognized as nothing more than careful legislative drafting designed to avoid the potential problem of repeal by implication, whether created by the enactment of section 50-e or by a later State enactment of a prior-notice law.

As to the second constitutional basis urged by the majority, it is agreed that, *on its face*, Local Law No. 2 is within the county's legislative power as affecting "[t]he acquisition, care, management and use of its highways" (NY Const, art IX, § 2, subd [c], par [ii], cl [6]). The infirmity of Local Law No. 2, however, arises from its conflict with section 139 of the Highway Law, a general law of the State, thereby rendering the ordinance unconstitutional (see NY Const, art IX, § 2, subd [c], par [ii]).

When it has seen fit to do so, the Legislature has enacted statutes limiting a municipality's duty to maintain its roads and sidewalks in a safe condition to those situations where there is prior written notice of the defect (see Village Law, § 6-628; Town Law, § 65-a). As to townships, however, the Legislature retained the constructive-notice doctrine to the extent of allowing liability to be imposed when

"such * * * condition existed for so long a period that the same should have been discovered and remedied in the exercise of reasonable care and diligence" (Town Law, § 65-a, subd 1).

In contrast, section 139 of the Highway Law imposes on a county liability for injuries caused by road conditions "existing because of the negligence of the county, its officers, agents or servants." Other than referring to a requirement that a notice of claim must be served in compliance with section 50-e of the General Municipal Law, section 139 makes no mention of notice — written, oral, actual, or constructive — of the defect as a condition precedent to a finding of negligence. In the absence of such language, counties "are answerable equally with individuals and private corporations for wrongs of officers and employees" (*Bernardine v City of New York*, 294 NY 361, 365, *supra*) and thereby subject to liability on the basis of constructive, as well as actual notice. If the Legislature had desired to do otherwise, it clearly knew how to achieve that goal.

No different result is compelled by the two cases relied on by the majority. Indeed, the local law considered in *MacMullen v City of Middletown* (187 NY 37, *supra*), rather than being a "delegation of legislative authority" or a legislative "deferr[al] to the localities to determine what notice is required" (at p 420), was actually part of the city charter (187 NY, at p 39), enacted by the State Legislature itself (L 1902, ch 572). The majority correctly notes that, in *MacMullen*, this court "held a prior notification provision in a municipal charter to be a valid exercise of legislative power" (at p 420). What the majority overlooks is that the *MacMullen* ordinance was held a valid exercise of the *State's* legislative power in that, in delegating powers to political subdivisions, the Legislature acts supremely and may impose any condition on bringing a civil action against a municipality (*MacMullen v City of Middletown, supra*, at pp 41-43). Thus, *MacMullen* offers no support to the majority's position, as the validity of a local law in a home-rule context was not at issue there.

Nor is *Fullerton v City of Schenectady* (285 App Div 545, affd no opn 309 NY 701, app dsmd 350 US 980) of any assistance to the majority. The Appellate Division there upheld the local law on the express finding that it was within "the constitutional power of the Legislature to delegate to a city of the second class the right to supersede provisions of a statute that applied to it" (285 App Div, at p 547). No such delegation exists here as to section 139 of the Highway Law. Moreover, although the Legislature has granted towns and villages the power to amend or supersede the Town Law and Village Law, respectively (Municipal Home Rule Law, § 10, subd 1, par [ii], cl d, subcl [3]; cl e, subcl [3]), no such general power has been granted to counties (compare Municipal Home Rule Law, § 10, subd 1, par [ii], cl b). The legal basis for validating the Schenectady ordinance in *Fullerton* simply is not present in the instant case.

In conclusion, Local Law No. 2 should be recognized as a substantive law in conflict with the provisions of a general law, section 139 of the Highway Law. As such, it is unconstitutional. Accordingly, I would affirm the order of the Appellate Division and answer the question certified in the affirmative.

Judges GABRIELLI, WACHTLER and MEYER concur with Judge JASEN; Chief Judge COOKE dissents and votes to affirm in a separate opinion in which Judges JONES and FUCHSBERG concur.

Order, insofar as appealed from, reversed, with costs, and the second affirmative defense reinstated. Question certified answered in the negative.

Memoranda, Third Department, June, 1981.

15 LENA HOLT, Respondent, v COUNTY OF TIOGA, Appellant. — Appeal from an order of the Supreme Court at Special Term (Keane, J.), entered December 4, 1980 in Tioga County, which, *inter alia*, denied defendant's motion to dismiss the complaint. Shortly after midnight on November 19, 1978, plaintiff was operating her 1973 Ford pick-up truck in a generally northerly direction on County Road 33 in Tioga County. She alleges that the right wheels dropped into a depression or drop-off on the edge of the pavement which caused her to lose control of the vehicle and resulted in her receiving serious personal injuries. Thereafter, plaintiff commenced an action against defendant alleging that her injuries were the result of defendant's negligence in the maintenance of the highway. By answer, defendant denied the material allegations in the complaint and asserted, as an affirmative defense, plaintiff's failure to comply with Tioga County Local Law No. 2 of 1978 which, in relevant part, provides that no civil action with respect to a highway defect may be maintained against the county unless prior written notice of the dangerous condition or defect has been given to the county. Defendant moved to dismiss the complaint for the above reason and plaintiff countered with, *inter alia*, the assertion that Local Law No. 2 was unconstitutional. It is well established that "The exceedingly strong presumption of constitutionality applies not only to enactments of the Legislature but to ordinances of municipalities as well. While this presumption is rebuttable, unconstitutionality must be demonstrated beyond a reasonable doubt and only as a last resort should courts strike down legislation on the ground of unconstitutionality" *(Lighthouse Shores v Town of Islip*, 41 NY2d 7, 11). Nonetheless, we conclude that Local Law No. 2 does not pass constitutional muster. Article IX (§ 2, subd [c]) of the New York Constitution grants to every local government the power to adopt local laws relating to its property, affairs or government, and the implementing statute clearly provides that the local law may not be inconsistent with any general law relating to its property, affairs or government (Municipal Home Rule Law, § 10, subd 1, par [i]). A general law is defined as one "which in terms and in effect applies alike to all counties, all counties other than those wholly included within a city, all cities, all towns or all villages" (NY Const, art IX, § 3, subd [d], par [1]). Section 139 of the Highway Law is such a general law and it permits the maintenance of the civil action against the county in consequence of the negligence of the county, its officers, agents or servants for defective, out of repair, unsafe, dangerous or obstructed highways. There is no prior written notice provision. Hence, Local Law No. 2 is incompatible and unharmonious with the general law, inconsistent with it (see *Town of Clifton Park v C.P. Enterprises*, 45 AD2d 96), and, therefore, unconstitutional insofar as it requires prior written notice. Defendant's reliance upon *Klimek v Town of Ghent* (71 AD2d 359) is misplaced. Our holding there was based upon section 10 (subd 1, par [ii], cl d, subcl [3]) of the Municipal Home Rule Law and the town's usage of the power it conveys. While the Legislature has seen fit to specifically provide villages (Village Law, § 6-628) and towns (Town Law, § 65-a) with the power to enact prior notice provisions, it has consistently withheld its approval

of such legislation for counties. Accordingly, since Tioga County's Local Law No. 2 of 1978 is plainly inconsistent with the general law to the extent that it requires prior written notice of defects, it is unconstitutional and the plaintiff is entitled to summary judgment to that effect. Order modified, on the law, by adding thereto a paragraph striking the second affirmative defense in the answer, and, as so modified, affirmed, with costs to plaintiff. Mahoney, P.J., Main, Mikoll, Yesawich, Jr., and Herlihy, JJ., concur.

APPENDIX C—Judgment Appealed From.

STATE OF NEW YORK, SUPREME COURT,

COUNTY OF TIOGA.

LEONA M. HOLT,

Plaintiff,

v.

COUNTY OF TIOGA,

Defendant.

Index No. 11990

The address of the plaintiff, Leona M. Holt, is R. D. #2, Berkshire, New York 13736.

The address of the defendant, County of Tioga, is Tioga County Courthouse, Owego, New York.

The plaintiff having moved the Court of Appeals for an order granting leave to appeal to said Court of Appeals from an order of the appellate division, third department, entered in the office of the Tioga County Clerk June 23, 1983, and the Court of Appeals in a decision dated November 29, 1983, having denied said motion for leave to appeal, with $20.00 costs and necessary reproduction disbursements, and

The necessary reproduction disbursements of the plaintiff having been taxed at $102.00, it is

ADJUDGED that the defendant, County of Tioga, have judgment against the plaintiff, Leona M. Holt, for the sum of $20.00 costs and $102.00 disbursements, at which amount said costs and disbursements are hereby taxed and allowed, making a total judgment of $122.00, and it is further

ADJUDGED that the defendant shall have execution therefor.

JUDGMENT this 8th day of December, 1983.

Tioga County Clerk

Costs of County of Tioga.

SUPREME COURT,

COUNTY OF TIOGA.

LEONA M. HOLT,

Plaintiff,

against

COUNTY OF TIOGA,

Defendant.

Index No. 11990

APPENDIX D—Notice of Appeal to the Supreme Court of the United States.

IN THE

COURT OF APPEALS

OF

THE STATE OF NEW YORK

LEONA M. HOLT,

Appellant,

vs.

COUNTY OF TIOGA, NEW YORK,

Appellee.

No. _____

Notice is hereby given that Leona M. Holt, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Court of Appeals of the State of New York denying her motion for leave to appeal to the Court of Appeals, which order precludes any further review of the dismissal of her case under State law, and which was entered on November 29, 1983.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Dated: January 18, 1984

COUGHLIN & GERHART
By: PETER H. BOUMAN
Attorney for Leona M. Holt,
Appellant
One Marine Midland Plaza
P. O. Box 2039
Binghamton, New York 13902
Tel.: (607) 723-9511

Affidavit of Service.

COURT OF APPEALS,

STATE OF NEW YORK.

LEONA M. HOLT,

Appellant,

vs.

COUNTY OF TIOGA, NEW YORK,

Appellee.

State of New York,
County of Broome, ss:

JANET M. BUDINE, being duly sworn, deposes and says that deponent is not a party to this action, is over 18 years of age, and resides at Winston Drive, Binghamton, New York, 13901.

That on the 18th day of January, 1984, deponent served the within Appellant's Notice of Appeal upon:

Thaler & Thaler, Esqs.
309 North Tioga Street
P. O. Box 266
Ithaca, New York 14850

Clerk of New York Supreme Court
Appellate Division, Third Department
Box 7288, Capitol Station
Albany, New York 12224

Tioga County Clerk
16 Court Street
Owego, New York 13827

by depositing true copies of same enclosed in a post-paid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

JANET M. BUDINE

Sworn to before me this
18th day of January, 1984.
RICHARD W. MERTENS
Notary Public, State of New York
Broome County (Illegible)
(Illegible)

APPENDIX E—Tioga County Local Law No. 2, Enacted July 10, 1978.

County of Tioga
Local Law No. 2 of the year 1978

A Local Law requiring written notice of defective, unsafe, dangerous or obstructed condition prior to maintenance of action against the County of Tioga for injuries to persons or damages to property.

Be it enacted by the County Legislature of the County of Tioga as follows:

Section 1

(a) No civil action shall be maintained against the County of Tioga or County Superintendent of Highways for damages or injuries to persons or property sustained by reason of any highway, bridge or culvert being defective, out of repair, unsafe, dangerous or obstructed unless written notice of such defective, unsafe, dangerous or obstructed condition of such highway, bridge or culvert was actually given to the County Clerk or County Superintendent of Highways, and that there was a failure or neglect within a reasonable time after the giving of such notice to repair or remove the defect, danger or obstruction complained of, or the place made reasonably safe.

(b) The County Clerk and the County Superintendent of Highways shall keep an indexed record, in a separate book, of all notice which they shall receive of the existence of such defective, unsafe, dangerous or obstructed condition which record shall set forth the date of receipt of such notice, the nature and location of the condition stated to

exist and the name and address of the person from whom the notice is received.

Section 2

Nothing herein contained shall be construed to relieve a claimant of the obligation to send a notice of claim as provided in General Municipal Law, §50.e.

Section 3

This Local Law shall become effective immediately after its final adoption.

No. 83-1387

IN THE

Supreme Court of the United States

October Term, 1983

LEONA M. HOLT,
Plaintiff-Appellant,

v.

COUNTY OF TIOGA, NEW YORK,
Defendant-Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

Supplement to Jurisdictional Statement—
State Civil Case

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Table of Contents.

Opinion of the Appellate Division, Third Department, 95 A.D.2d 934, Decided June 16, 1983.

10 LEONA M. HOLT, Appellant, v. COUNTY OF TIOGA, Respondent.—Appeal (1) from an order of the Supreme Court at Special Term (Bryant, J.), entered October 12, 1982 in Tioga County, which granted defendant's motion for summary judgment dismissing plaintiff's complaint, and (2) from the judgment entered thereon. Plaintiff was injured in an accident on West Creek Road in Tioga County when the right wheels of the pickup truck she was driving fell into a depression or drop-off on the edge of the pavement causing the vehicle to veer across the highway and collide with a tree. Suit was brought against the county for negligently maintaining the shoulder. The county interposed as an affirmative defense that it had not been given prior notice of the defective condition as was required by Tioga County Local Law No. 2 of 1978. Our earlier decision declaring the local law repugnant to section 139 of the Highway Law and therefore unconstitutional (82 AD2d 991) was reversed on appeal (56 NY2d 414). On remittal, Special Term found that prior notice of the shoulder condition giving rise to the accident had not been furnished, dismissed plaintiff's estoppel and constitutional arguments, and granted summary judgment in favor of defendant. Plaintiff contends that Local Law No. 2 contravenes the due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution. Initially, we note that since neither we nor the Court of Appeals expressly addressed these particular constitutional claims earlier, the doctrine of law of the case does not hinder our consideration of them now (see *Barrett v. State Mut. Life Assur. Co.*, 58 AD2d 320, affd 44 NY2d 872, cert den 440 US 912). As for the merits of this argument we find no constitutional violation. The right to sue

a subdivision of the State for negligence in the performance of a governmental function is founded upon statute and the legislative authority involved may properly limit such right as it sees fit (*Matter of Brown v. Board of Trustees of Town of Hamptonburg, School Dist. No. 4*, 303 NY 484, 489; *MacMullen v. City of Middletown*, 187 NY 37). Since Local Law No. 2, which was in effect at the time of the accident, defined a right to sue only if prior written notice had been given to the county, the absence of such notice means that plaintiff never possessed a vested right to bring an action. Moreover, the statute possesses a rational basis in that it enables the county to protect the traveling public (*Martin v. City of Cohoes*, 37 NY2d 162, 166); for these reasons we find no denial of due process. We also reject the argument that Local Law No. 2 has been applied in an impermissibly retroactive manner. This position is based upon the premise that the alleged defect in the shoulder of the road existed prior to the enactment of the statute and that the county should not be permitted to legislate away liability for such a defect by imposing a prior notice requirement. Plaintiff's focus solely on the existence of the defect is, however, misguided because her purported right to sue could not have vested until the occurrence of the accident, at which point Local Law No. 2 had been in effect for over four months. Thus, the statute has not been retroactively applied (see *Dodin v. Dodin*, 17 Misc 35, 40, affd 16 App Div 42, affd 162 NY 635). The equal protection argument is similarly unavailing. All victims involved in Tioga County accidents caused by improper highway maintenance are required to demonstrate prior notice. Furthermore, it is not illogical to allow each county to determine whether a prior written notice ordinance is desirable, for each is responsible for the maintenance of certain roadways within its geographical jurisdiction and dissimilar local road conditions exist in different

parts of the State. With respect to the assertion that the notice requirement of the local law had indeed been complied with, the most sanguine showing plaintiff makes is that a resident of the West Creek Road area had, once in 1976 and again 13 days before the accident, complained to the county about the condition of the road's shoulder. Each complaint was directed at a point concededly located at least one-quarter mile away from the place where plaintiff's truck left the highway; Special Term quite correctly found this to be inadequate notice. While the local law is silent as to the specificity required of the prior notice, it should at the very least be such that it would "probably have brought the particular condition at issue" to the attention of the authorities (*Brooks v. City of Binghamton,* 55 AD2d 482, 483-484). Notification of a hole in the shoulder of the road a quarter of a mile from the accident scene did not create an awareness of the defect which is at the center of this controversy. Moreover, the fact that county personnel, in the course of responding to these complaints, may have driven by the site which allegedly precipitated the accident does not render the county liable. Except where unusual circumstances are shown to prevail (see *Blake v. City of Albany,* 63 AD2d 1075, affd 48 NY2d 875, where the area in question was inspected on an almost daily basis by the city to ensure against the very danger which caused the accident), it is the prior written notice and not possible actual or constructive knowledge on the municipality's part which affords the plaintiff the right to recover under these statutes (*MacMullen v. City of Middletown,* 187 NY 37, 47, *supra*); thus, the notice provision must be strictly respected. Finally, we reject the contention that the county should be estopped from taking refuge in the local law because it failed to observe the statute's record-keeping provisions which require that "the County Clerk and the County Superintendent of Highways shall

keep an indexed record, in a separate book, of all notices which they shall receive". Apparently only the superintendent of highways kept such a record. Not only is the language of the statute unclear concerning the responsibility of each to keep a separate record, but defendant did in fact receive the information respecting prior notifications from the superintendent of highways; more importantly, nothing in the record indicates plaintiff relied to her detriment upon the county's failure to maintain a duplicate set of these records (see *Andersen v. Long Is. R.R.*, 88 AD2d 328, 342). Order and judgment affirmed, without costs. Main, J.P., Mikoll, Yesawich, Jr., Weiss and Levine, JJ., concur.

Memoranda, Third Department, June, 1981.

15 LENA HOLT, Respondent, v. COUNTY OF TIOGA, Appellant.—Appeal from an order of the Supreme Court at Special Term (Keane, J.), entered December 4, 1980 in Tioga County, which, *inter alia,* denied defendant's motion to dismiss the complaint. Shortly after midnight on November 19, 1978, plaintiff was operating her 1973 Ford pick-up truck in a generally northerly direction on County Road 33 in Tioga County. She alleges that the right wheels dropped into a depression or drop-off on the edge of the pavement which caused her to lose control of the vehicle and resulted in her receiving serious personal injuries. Thereafter, plaintiff commenced an action against defendant alleging that her injuries were the result of defendant's negligence in the maintenance of the highway. By answer, defendant denied the material allegations in the complaint and asserted, as an affirmative defense, plaintiff's failure to comply with Tioga County Local Law No. 2 of 1978 which, in relevant part, provides that no civil action with respect to a highway defect may be maintained against the county unless prior written notice of the dangerous condition or defect has been given to the county. Defendant moved to dismiss the complaint for the above reason and plaintiff countered with, *inter alia,* the assertion that Local Law No. 2 was unconstitutional. It is well established that "The exceedingly strong presumption of constitutionality applies not only to enactments of the Legislature but to ordinances of municipalities as well. While this presumption is rebuttable, unconstitutionality must be demonstrated beyond a reasonable doubt and only as a last resort should courts strike down legislation on the ground of unconstitutionality" (*Lighthouse Shores v. Town of Islip,* 41 NY2d 7, 11). Nonetheless, we conclude that Local Law No. 2 does not pass constitutional muster. Article IX (§2, subd [c]) of the New York Constitution

grants to every local government the power to adopt local laws relating to its property, affairs or government, and the implementing statute clearly provides that the local law may not be inconsistent with any general law relating to its property, affairs or government (Municipal Home Rule Law, §10, subd 1, par [i]). A general law is defined as one "which in terms and in effect applies alike to all counties, all counties other than those wholly included within a city, all cities, all towns or all villages" (NY Const, art IX, §3, subd [d], par [1]). Section 139 of the Highway Law is such a general law and it permits the maintenance of the civil action against the county in consequence of the negligence of the county, its officers, agents or servants for defective, out of repair, unsafe, dangerous or obstructed highways. There is no prior written notice provision. Hence, Local Law No. 2 is incompatible and unharmonious with the general law, inconsistent with it (see *Town of Clifton Park v. C.P. Enterprises*, 45 AD2d 96), and, therefore, unconstitutional insofar as it requires prior written notice. Defendant's reliance upon *Klimek v. Town of Ghent* (71 AD2d 359) is misplaced. Our holding there was based upon section 10 (subd 1, par [ii], cl d, subcl [3]) of the Municipal Home Rule Law and the town's usage of the power it conveys. While the Legislature has seen fit to specifically provide villages (Village Law, §6-628) and towns (Town Law), §65-a) with the power to enact prior notice provisions, it has consistently withheld its approval of such legislation for counties. Accordingly, since Tioga County's Local Law No. 2 of 1978 is plainly inconsistent with the general law to the extent that it requires prior written notice of defects, it is unconstitutional and the plaintiff is entitled to summary judgment to that effect. Order modified, on the law, by adding thereto a paragraph striking the second affirmative defense in the answer, and, as so modified, affirmed, with costs to plaintiff. Mahoney, P.J., Main, Mikoll, Yesawich, Jr., and Herlihy, JJ., concur.

No. 83-1387

IN THE

Supreme Court of the United States

October Term, 1983

LEONA M. HOLT,
Plaintiff-Appellant,

v.

COUNTY OF TIOGA, NEW YORK,
Defendant-Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

MOTION TO DISMISS

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Table of Contents.

TABLE OF CASES.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983.

No. 83-1387

LEONA M. HOLT,

Plaintiff-Appellant,

v.

COUNTY OF TIOGA, NEW YORK,

Defendant-Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

MOTION TO DISMISS.

The appellee moves this Court to dismiss the appeal herein for want of a substantial federal question.

I.

Statute involved and the nature of the case.

A. The statute.

This appeal raises the question of the validity of Tioga County Local Law No. 2 of 1978, which took effect July 10, 1978.

The Local Law states in part:

> (a) No civil action shall be maintained against the County of Tioga or the County Superintendent of Highways for damages or injuries to persons or property sustained by reason of any highway, bridge or culvert being defective, out of repair, unsafe, dangerous or obstructed unless written notice of such defective, unsafe, dangerous or obstructive condition of such highway, bridge or culvert was actually given to the County Clerk or County Superintendent of Highways, and that there was a failure or neglect within a reasonable time after the giving of such notice to repair or remove the defect, danger or obstruction complained of, or the place made reasonably safe.

The law further provides that the County Clerk and the County Superintendent of Highways shall keep a record of all notices which they receive concerning the existence of such defective, unsafe, dangerous or obstructive conditions, setting forth the date of receipt of such notice and the nature and location of the conditions stated to exist in the name of the person and address of the person from whom the notice is received.

B. The proceedings below.

The appellee is a rural county in upstate New York with 145 miles of county highways to maintain.

On November 19, 1978, the appellant was involved in a one car motor vehicle accident in which the vehicle which she was driving went out of control and hit a tree located outside of the county road right of way known as West Creek Road.

Examination of the appellee's records reveal that there were no prior written notices of the condition which appellant alleged caused her vehicle to go out of control.

Appellant's pleadings did not allege compliance with Local Law No. 2 and appellee's answer set forth the affirmative defense of lack of compliance with Local Law No. 2.

After extensive pretrial discovery by the appellant, the appellee moved to dismiss the action because of the appellant's failure to plead compliance with the Local Law. Compliance with the Local Law could have been effected if anyone had given written notice of the alleged condition to appellee prior to the accident. The New York Supreme Court at Special Term, by an Order entered December 4, 1980, denied appellee's motion. Appellee took an appeal to the Appellate Division of the Supreme Court of the State of New York, Third Department, which found Local Law No. 2 of 1978 unconstitutional as inconsistent with the general law of the state (82 A.D.2d 991). Upon application the Appellate Division, Third Department, certified a single question to the New York Court of Appeals for determination:

> Is the determination of the Appellate Division that Local Law No. 2 of 1978 of the County of Tioga is unconstitutional correct?

The New York Court of Appeals, by a decision dated June 15, 1982, held that the Local Law No. 2 was not inconsistent with either Section 139 of the Highway Law nor Section 50-e of the General Municipal Law of the State of New York and that the County of Tioga had a constitutionally delegated power to enact a prior notification statute.

In Supreme Court, Special Term, appellee subsequently moved for summary judgment on the grounds that there had been no prior written notice, given to appellee of the alleged defect in compliance with the Local Law. On October 7, 1982, Special Term granted appellee's motion. Appellant appealed to the Appellate Division, Third Department of the Supreme Court of the State of New York, which affirmed the judgment of Special Term and found Local Law No. 2 to be constitutional under federal law.[1]

Appellant appealed to the Court of Appeals of the State of New York, and on September 27, 1983 the Court of Appeals dismissed the appeal on the grounds that "no substantial constitutional question is directly involved." Appellant further moved for leave to appeal to the Court of Appeals on non-constitutional grounds, which motion was denied on November 29, 1983.

II.

ARGUMENT.

This case presents no substantial federal or constitutional question.

It is settled that not every allegation of a federal question will suffice to give jurisdiction: "There must be a real, substantive question on which the case may be made to turn," that is, "a real and not a merely formal federal question is essential to the jurisdiction of this court."

[1]The constitutional arguments concerning Equal Protection and Due Process under the United States Constitution advanced herein by appellant were briefed and argued to the New York Supreme Court, Appellate Division, Third Department, and New York Court of Appeals during both the earlier and subsequent appeals.

Equitable Life Assurance Society v. Brown, 187 U.S. 308, 311, 23 S. Ct. 123, 47 L.Ed. 190 (1902), *citing New Orleans Water Works Company v. Louisiana* (1902), 185 U.S. 336, 345, 22 S. Ct. 691, 46 L.Ed. 936.

Plaintiff's sole constitutional argument is that Tioga County Local Law No. 2 of 1978 violates her guarantees of due process and equal protection under the 14th Amendment of the United States Constitution.

A. There is no constitutional or Common Law right to sue the sovereign.

Appellant's entire jurisdictional statement rests upon the single contention that there is a "vested" right to sue the sovereign (in this case, Tioga County). There is no constitutional right to sue the sovereign:

> The United States as sovereign is immune from suit unless it has consented to be sued, *United States v. Sherwood*, 312 U.S. 584, 61 S. Ct. 767, 85 L.Ed. 408 (1941). A corollary to this doctrine of governmental immunity is that, when the United States consents to be sued, Congress may define the conditions under which suits will be permitted. *Kendall v. United States*, 107 U.S. 123, 125, 2 S. Ct. 277, 27 L.Ed. 437 (1882).

Garrett v. United States, 640 F.2d 24 (6th Cir. 1981). In *Payne v. Panama Canal Co.*, 607 F.2d 155 (5th Cir. 1979), the court stated:

> Congress may limit such a waiver by imposing conditions and restrictions it deems necessary. *Crown Coat Front Co. v. United States*, 386 U.S. 503, 520, 87 S. Ct. 1177, 18 L.Ed. 2d 256 (1967); *Honda v. Clerk*, 386 U.S. 484, 501, 87 S. Ct. 1188,

18 L.Ed.2d 244 (1967); *Hart v. United States*, 585 F.2d 1280 (5th Cir. 1978), *cert. denied* ____ U.S. ____, 99 S. Ct. 2882, 61 L.Ed. 2d 310 (1979); *Ducharme v. Merrill National Laboratories*, 574 F.2d 1307, 1311 (5th Cir. 1978), *cert. denied*, 439 U.S. 1002, 99 S. Ct. 612, 58 L.Ed. 2d 677 (1979). See also *Tsakos Shipping and Trading S.A. v. M/T "Taboga,"* 597 F.2d 66 (5th Cir. 1979).

607 F.2d at 163. See also: *Franquez v. U.S.*, 604 F.2d 1239 (9th Cir. 1979); *Stubbs v. U.S.*, 620 F.2d 775 (10th Cir. 1980); *Bor-Son Building Corp. v. Heller*, 572 F.2d 174 (8th Cir. 1978).

The Court of Appeals of the State of New York addressed this point at length in rejecting due process and equal protection challenges to a state statute placing limitations and restrictions on those seeking to sue the sovereign:

> The right, then, of citizens to bring suit against a municipal corporation for alleged negligence in the performance of a governmental function, *did not exist at common law*. Furthermore it was not in the past, nor is it at present, guaranteed by constitution provision. The present rule, that the state and its municipal adjuncts are liable in negligence in the same manner as individuals or corporations, is statutory in origin. (Court of Claims Section 8; *Bernadine v. City of New York*, 294 N.Y. 361.) Manifestly, then, any such right granted is one which might have been withheld altogether by the Legislature. Accordingly, the right to bring suit against a municipality may be granted upon such conditions as the Legislature, in its wisdom, sees fit to impose. (*Winter v. City of Niagara Falls*, 190 N.Y. 198; *MacMullen v. City of Middletown*, 187

> N.Y. 37; *City of Birmingham v. Weston*, 233 Ala. 563; *Miramar Co. v. City of Santa Barbara*, 122 P.2d 643 [Cal.]; *Baker v. Town of Manitou, Colo.*, 277 F. 232 [C.A. 8th]; *Sherfey v. City of Brazil*, 213 Ind. 493; *Palmer v. City of Cedar Rapids*, 165 Iowa 595; *Dechant v. City of Hays*, 112 Kan. 729; *Galloway v. City of Winchester*, 299 Ky. 87; *Madden v. City of Springfield*, 131 Mass. 441; *Davidson v. City of Muskegon*, 111 Mich. 454; *Szroka v. Northwestern Bell Tel. Co.*, 171 Minn. 57; *Schmidt v. City of Fremont*, 70 Neb. 577; *Robinson v. City of Memphis*, 171 Tenn. 471; *Hurley v. Town of Bingham*, 63 Utah 589.)

Matter of Brown v. Trustees of Hamptonburg School District, 303 N.Y. 484, 489 (1952). See also *Pausley v. Chaloner*, 54 A.D.2d 131 (3rd Dep't 1976).

Inasmuch as a government imposes conditions or restrictions on the right to bring suit against it, such conditions or restrictions cannot violate due process and equal protection guarantees because there is no constitutional entitlement, *per se*, to sue the sovereign.

It is thus submitted that the decision of the Appellate Division below (*Holt v. Tioga County*, 95 A.D.2d 934, 935 [3rd Dep't 1983]) was correct in asserting that:

> The right to sue a subdivision of the State for negligence in the performance of a governmental function is founded upon statute and the legislative authority involved may properly limit such right as it sees fit. * * * Since Local Law No. 2, which was in effect at the time of the accident, defined a right to sue only if prior written notice had been given to the county, the absence of such notice means that plaintiff never possessed a vested right to bring an action.

B. There is a rational basis for this law.

Where a fundamental right or a suspect classification is involved, a statute or other government action must be subject to strict judicial scrutiny in order to meet due process and equal protection requirements: *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 17 (1973). Such fundamental rights embrace interstate travel, privacy, voting and all first amendment rights. No such right is asserted here, nor does the appellant allege that she is within a suspect classification.

In all other cases, a governmental act or statute does not violate due process or equal protection if it rationally relates to any possible legitimate end of government: *Massachusetts Board of Retirement v. Mergio*, 427 U.S. 307 (1976); *San Antonio Independent School District v. Rodriguez, supra*; *Reed v. Reed*, 404 U.S. 71 (1971). The traditional analysis thus required is that a legislative classification shall be sustained unless it is patently arbitrary and bears no rational relationship to a legitimate government interest. Where this test is used, it is irrelevant whether the supposed justification is compelling or merely legitimate. Convenience or efficiency will suffice and the action or statute need not "closely fit" the justification or basis for the law: *Vance v. Bradley*, 440 U.S. 93 (1979). The act is presumed valid and the burden is on the challenging party to prove its invalidity. Further, this Court has held that it will not substitute its judgment for that of the Legislature: *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124 (1978).

The Appellate Division of the Supreme Court of the State of New York below found there was a rational basis for Local Law No. 2 in *Holt v. Tioga County*, 95 A.D.2d 934 (3rd Dep't 1983) at 935:

> The statute possesses a rational basis in that it enables the county to protect the travelling public (*Martin v. City of Cohoes*, 37 N.Y.2d 162, 166); for these reasons we find no denial of due process.

A second rational basis for this law is to limit the liability of the taxpaying public to defective conditions of which the County is aware of and which it had sufficient time to correct.

C. Many other states have enacted prior written notice statutes pursuant to waiver of sovereign immunity.

Contrary to the contention of appellant at page 8 of her brief, that "Outside of New York State there are no cities, towns or states which have prior written notice of defect laws," governmental units in the following states have enacted prior written notice of defect statutes or laws: Maryland, Michigan, Minnesota, Nebraska, Oregon, Rhode Island and Wyoming.[2]

In addition, prior actual notice statutes are in effect in Kansas, Maine and Montana.[3]

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[2]Md.—See Code Pub. Loc. Laws 1930, art 1A §89.

Mich.—Comp. Laws 1948 and C.L.S. 1961, §242.8. See now Rev. Judicature Act §691-1403, s.3.

Minn.—See, for example, Charter of City of Waseca, enacted pursuant to G. L. 1903, ch. 238, p. 349. See now Minn. Stat. Ann. §465-121.

Ore.—See, for example, Ch. X §14, 1940, Charter of City of Independence.

Neb.—Neb. Rev. Stat. RRS §14-802, rep. by Law 1969 c.138, §28.

Rhode Island—G. L. 1923, Ch. 96, §13.

Wyoming—Wyo. Stat. 1957, §15-28.

[3]Kan.—G.S. 1935 §68-301.

Maine—Rev. Stat. Ann., tit. 23 §3655.

Montana—Mont. Rev. Cent. Code RCM 1947 §11-1305.

Moreover, the courts have consistently upheld both prior written notice and prior actual notice statutes in many states[4]:

Schigley v. Waseca, 106 Minn. 94 (1908); *Abbott v. City of Rockland*, 105 Me. 147 (1909); *Thorbjohnson v. Rockland-Rockpower Lime Co.*, 275 A.2d 588 (Me. 1971); *Pomeroy v. City of Independence*, 209 Ore. 213 (1957); *Noonan v. City of Portland*, 161 Ore. 213 (1938); *Kulish v. Cray*, 52 R.I. 212 (1932); *Engle v. Mayor and City Council of Cumberland*, 180 Md. 465 (1942); *Stewart v. Lincoln*, 114 Neb. 84 (1925); *Updike v. City of Omaha*, 87 Neb. 228 (1910); *Stockton Automobile Co. v. Confer*, 154 Cal. 902 (1908); *Backstrom v. Ogallah Turnpike*, 149 Kan. 553 (1939); *Williams v. Kansas State Highway Commission*, 134 Kan. 810 (1932); *McGuire v. Board of Commissioners of Ellis County*, 133 Kan. 225 (1931); *Arnold v. Board of Commissioners of Coffey County*, 131 Kan. 343 (1930); *Ratliff v. City of Great Falls*, 132 Mon. 89 (1957); *Andrews v. City of Butte*, 116 Mon. 69 (1944); *Forsyth v. Saginaw City*, 158 Mich. 201 (1909); *Boike v. Flint*, 374 Mich. 462, 132 N.W. 2d 658 (1965); *Kowalczyk v. Bailey*, 1 Mich. App. 55 (1965).

[4]It is important to note that the cases of which appellant principally relies, *O'Neil v. City of Parkensburg*, 237 S.E.2d 504 (W. Va. 1977); *Grubaugh v. City of St. Johns*, 180 N.W.2d 778 (Mich. 1970); *Barry v. Village of Port Jervis*, 64 App. Div. 268 (2d Dep't 1901), all involve notice of claim provisions, not prior notice of defect statutes.

Conclusion.

For all of the above reasons the instant appeal should be dismissed.

Respectfully submitted,

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